APPENDIX A — LETTER OF THE OFFICE OF THE CLERK, WASHINGTON, DC ENLARGING TIME TO FILE PETITION DATED MARCH 22, 1999

OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 22, 1999

Mr. Michael Perez
P.O. Box 759
Minersville, PA 19106

Re: Michael Perez
v. United States
Application No. A-774

Dear Mr. Perez:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on March 22, 1999, extended the time to and including June 11, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By s/ Sandra Elliott Spagnolo
Sandra Elliott Spagnolo
Assistant Clerk

APPENDIX B — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED OCTOBER 1, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

97-1974

UNITED STATES OF AMERICA

v.

MIKE PEREZ,
a/k/a
MIGUEL PEREZ-CINTRON
a/k/a
MIGUEL PEREZ

Mike Perez,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

(Criminal No. 94-192-01)
District Judge: The Honorable Herbert J. Hutton

Submitted Under Third Circuit LAR 34.1(a)
September 17, 1998

Appendix B

Before: SLOVITER, SCIRICA, and ALITO,
Circuit Judges

(Opinion Filed: OCT 01 1998)

MEMORANDUM OPINION OF THE COURT

ALITO, *Circuit Judge*:

I.

Mike Perez ("Perez") appeals from a final judgment in a criminal case entered following a jury trial for various drug-related offenses. Perez presents five arguments on appeal.

II.

First, he argues that in denying his post-trial motion for acquittal, the district court erred in concluding that the evidence was sufficient to support the conviction for money laundering. We have held that a "verdict will be overruled only if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987). After reviewing the record, we conclude that the evidence was sufficient to support Perez's money-laundering conviction.

Second, Perez claims that the district court abused its discretion in refusing to declare a mistrial after the prosecutor allegedly commented on the credibility of several witnesses.

We review this decision "for abuse of discretion, and, if error is found, we apply harmless error analysis." *United States v. Molina-Guevara*, 96 F.3d 698, 702 (3d Cir. 1996). After reviewing the record, we conclude that the district court did not abuse its discretion when it denied Perez's motion for a mistrial.

Third, Perez argues that the district court erred in enhancing Perez's base offense level based on a finding that Perez was "an organizer or leader of a criminal activity that involved five or more participants." In considering the district court's application of the Sentencing Guidelines, we review factual findings for clear error. Our review of the district court's legal conclusions is plenary. *United States v. Taylor*, 98 F.3d 768 (3d Cir. 1996), *cert. denied*, 117 S.Ct. 1016 (1997). We conclude that the district court had sufficient evidence before it to conclude that an enhancement was appropriate under U.S.S.G. § 3B1.1.

Fourth, Perez argues that the district court erred in denying a downward departure based on sentencing entrapment. Specifically, he contends that the government's failure to effect his arrest immediately after a 1993 undercover drug buy constituted conduct which was "egregious and outrageous so as to rise to the level of sentencing entrapment." The district court found that the government did not engage in sentencing entrapment, *see* DA 291, and we see no basis to disagree. In any event, we have never approved a downward departure based on sentencing entrapment and decline the invitation to do so in this case.

Fifth, Perez argues that the district court erred in calculating the amount of cocaine for which he was responsible. The district court found that the government had established, by a preponderance of the evidence, that Perez was responsible for conspiring to distribute more than 150 kilograms of cocaine. Accordingly, pursuant to U.S.S.G. § 2D1.1(c)(1), Perez's base offense level was determined to be 38. Perez claims that "vagueness" and "lack of specificity" in the record render the district court's conclusions invalid.

As we explained in *United States v. Collado*, 975 F.2d 985, 998 (3d Cir. 1992), "some degree of estimation must be permitted" in the calculation of amounts where not all of the drugs involved in a large-scale conspiracy can be seized and measured. Having reviewed the record, we conclude that the district court's estimates were properly grounded in fact. Accordingly, we conclude that the district court's conclusion was not clearly erroneous, and that Perez's base offense level was properly fixed at 38.

III.

For the foregoing reasons, we affirm the judgment entered on November 20, 1997.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

s/ [illegible]
Circuit Judge

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1974

UNITED STATES OF AMERICA

v.

MIKE PEREZ,
a/k/a
MIGUEL PEREZ-CINTRON
a/k/a
MIGUEL PEREZ

Mike Perez,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 94-192-01)
District Judge: The Honorable Herbert J. Hutton

Submitted Under Third Circuit Rule 34.1(a):
September 17, 1998

Before: SLOVITER, SCIRICA, and ALITO,
Circuit Judges

(Opinion Filed: OCT 01 1998)

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on September 17, 1998.

On consideration whereof, it is now hereby ordered and adjudged by this Court that the judgment of the District Court dated November 20, 1997, be and the same is hereby affirmed.

ATTEST:

s/ P. Douglas Sisk
Clerk

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 13, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

97-1974

UNITED STATES OF AMERICA

v.

MIKE PEREZ,
a/k/a
MIGUEL PEREZ-CINTRON
a/k/a
MIGUEL PEREZ

Mike Perez,

Appellant

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and RENDELL, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who

participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

s/ [illegible]
Circuit Judge

DATED: JAN 13 1999

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED NOVEMBER 20, 1997

United States District Court
Eastern District of Pennsylvania

Case Number: 2:94CR00192-001

UNITED STATES OF AMERICA

v.

MIKE PEREZ

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

F. EMMETT FITZPATRICK, ESQ.
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1,3,10,11,14,15 & 23. after a plea of not guilty.

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Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	CONSPIRACY TO DISTRIBUTE COCAINE.	03/31/1994	1
21 U.S.C. § 841(a)(1)	DISTRIBUTION OF COCAINE.	03/31/1994	3
21 U.S.C. § 843(b)	UNLAWFUL USE OF A TELEPHONE.	03/31/1994	10,11,14 & 15
18 U.S.C. § 1956	MONEY LAUNDERING.	03/31/1994	23
18 U.S.C. § 2	AIDING AND ABETTING.	03/31/1994	3 & 23
18 U.S.C. § 1956 (a)(I)(A)(i)	MONEY LAUNDERING.	03/31/1994	23
18 U.S.C. § 2	AIDING AND ABETTING.	03/31/1994	2 & 23

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

Appendix D

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 168-58-5133	11/20/97 Date of Imposition of Judgment
Defendant's Date of Birth: 07/25/1964	
Defendant's USM No.: 47688-066	s/ Herbert J. Hutton Signature of Judicial Officer
Defendant's Residence Address: c/o F.C.I., BOX 280 FAIRTON NJ 08320	HON. HERBERT J. HUTTON, U.S.D.J. Name and Title of Judicial Officer
Defendant's Mailing Address: c/o F.C.I., BOX 280 FAIRTON NJ 08320	11/20/1997 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 360 month(s).

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360 months on Counts 1 & 3.
48 months on Counts 10,11,14 & 15.
240 months on Count 23; all to run CONCURRENTLY with each other.

* * *

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s)

5 years on Counts 1 & 3.
1 year on Counts 10,11,14 & 15.
3 years on Count 23; all to run CONCURRENTLY with each other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

Appendix D

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision

* * *

Appendix D

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with

any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and treatment for alcohol and drug abuse, as directed by the probation officer.

Appendix D

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine
Totals:	$ 350.00	$ 5,000.00

* * *

FINE

* * *

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

* * *

Appendix D

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

* * *

B ☒ $ 350.00 immediately, balance due (in accordance with C, D, or E);

* * *

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Fine payments shall be made through the Inmate Financial Responsibility Program.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal

monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Paragraphs 29 & 39: 2-point enhancement withdrawn for obstruction of justice.

Guideline Range Determined by the Court:

Total Offense Level: 42

Criminal History Category: I

Imprisonment Range: 360 TO LIFE.

Supervised Release Range: 5 YEARS.

Fine Range: 25,000.00 to $ 6,500,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

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☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

* * * *

APPENDIX E — EXCERPTS FROM PEREZ SENTENCING TRANSCRIPT DATED NOVEMBER 20, 1997

* * *

. . . that if he was really minimizing this conversation, the CI, which I was trapped with, he would have never been — he would have never gotten in the trouble that he got. If they were really listening to these conversations, the guy would have not been locked up, they would have stopped the guy on time. And that's part of the amounts on the records. They would have stopped listening to the guy on time. And I still feel that this is misconduct. And they has me, 'cause of this misconduct, not my misconduct, his misconduct.

Also, I had some drug problems in the institution. Before I came to the institution, I was in the methadone program. I went looking for help. When I got there, a guy by the name Pedro Gonzales was my counselor. I was in a program and I told him my situation. Well, he said to me, it's fine. He put me on forty milligrams of methadone. A month later, I was on eighty milligrams of methadone. I give him dirty urines on heroin. He didn't stop me. I went for private — I was paying $45.00 a week, a hundred and eighty dollars a month, your Honor, I was trying to clean myself. Rehabilitate myself.

Your Honor, in all this stuff — and when it comes to trial, this man was my co-defendant. I looked for help, your Honor, I try. Now, look at — I'm —

I don't know what you're thinking, your Honor, but I'm talking with my heart. I don't come here — it's been almost four years, your Honor.

* * *

Appendix E

At times, I get stressed, I'm confused. I don't know what's reality. In prison we are all there, people think about this, this one thinks about that, but we're human and we all make mistakes, your Honor. This was not my mistake. I looked for — for help. Eighty milligrams of methadone is something to put you out of your range, plus using heroin daily.

Also, Ms. Echeverry, she testified that I introduced all these people to her. No. It's not like that, your Honor. You let loose people that are out there, that is worse. They say — the Bible says, your Honor, once you clean yourself, is all right, you take the demon out. But once you come — the demon come back, it comes back with seven more. That's what you let out out there, your Honor.

Look at Mr. Haines. I got affidavits right here, your Honor. If you read this affidavit, your Honor, I don't think you'd be able to sentence me today.

MR. FITZPATRICK: Do you want me to read this?

THE COURT: Do you want a response?

THE DEFENDANT: Mr. Moya — yes.

THE COURT: You have an attorney, he makes those judgments, sir.

THE DEFENDANT: This is —

THE COURT: You can give the affidavit to your attorney and if he decides he thinks it's of a merit of some kind, he'll raise it with me.

* * * *

APPENDIX F — EXCERPTS FROM VOLUME 5 OF PEREZ TRIAL TRANSCRIPT

* * *

Pedro Pietro-Gonzalez – Direct

Q. Theology?

A. Yes.

Q. And were you ordained?

A. Yes.

Q. Did you have any other employment?

A. Yes, I was working in two clinic. Drug addiction clinic in Philadelphia.

Q. Did you ever work as an aircraft oven operator?

A. Yes. Oh, yes, with Sikowski Aircraft.

Q. And did you ever work as an superintendent of maintenance at a bank?

A. Yes. City Trust Company.

Q. Did there come a point in your life when you started to use heroin?

A. Yes.

Appendix F

Q. Did you become addicted to heroin?

A. Yes.

Q. Have you since stopped using heroin?

A. Yes, around a year and a half, two years.

Q. Did there come a point in time when you became involved with the distribution of cocaine?

A. Yes.

Q. Did you enter a guilty plea with respect to that distribution?

A. Yes.

* * * *

APPENDIX G — GOVERNMENT'S SENTENCING MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JUNE 3, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CRIMINAL NO. 94-192-01

UNITED STATES OF AMERICA

V.

MIKE PEREZ, a/k/a "Miguel Perez-Cintron," a/k/a "Miquel Perez"

GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America, by its attorneys, Michael R. Stiles, United States Attorney for the Eastern District of Pennsylvania, and Roberta Benjamin, Assistant United States Attorney for that District, submits the following memorandum in aid of sentencing.

I. *THE GUILTY PLEA*

On November 2, 1994, a federal grand jury in the Eastern District of Pennsylvania returned a 41-Count Superseding Indictment charging the defendant with conspiracy to distribute cocaine, in violation of 21 U.S.C. §846 (Count One); distribution of cocaine, in violation of 21 U.S.C. §841(a)(1) (Counts Two and Three); possession with intent

to distribute cocaine, in violation of 21 U.S.C. §841(a)(1) (Count Four); unlawful use of a telephone, in violation of 21 U.S.C. §843(b) (Counts Seven through Twenty-One); money laundering, in violation of 21 U.S.C. §1956(a) (Count Twenty-Three); criminal forfeiture, in violation of [text illegible] (Count Twenty-Four); criminal forfeiture, pursuant to 18 U.S.C. §982 (Count Forty-One); and aiding and abetting, in violation of 18 U.S.C. §2. On April 11, 1996, the government moved to redact the Superseding Indictment so that the defendant was facing charges only on Counts One, Three, Ten, Eleven, Fourteen, Fifteen, and Twenty-three at trial. The forfeiture counts (numbers 24 and 41) were bifurcated for separate consideration by the jury in the event the defendant was found guilty of the substantive counts. On May 16, 1996, following a jury trial before the Honorable Herbert J. Hutton, the defendant was found guilty of all the substantive counts. Also, on May 16, 1996, the defendant waived his right to a trial by jury of the forfeiture counts and agreed to have the Court decide that issue at the time of sentencing.

II. *MAXIMUM SENTENCE*

The maximum sentence for Count One of the Superseding Indictment is life imprisonment, with a ten-year mandatory minimum, at least 5 years supervised release, a $4,000,000 fine, and a $50 special assessment. On Count Three, the maximum term of imprisonment is 40 years, with a five-year mandatory minimum, at least 4 years supervised release, a $2,000,000 fine, and a $50 special assessment. On each of Counts Ten, Eleven, Fourteen, and Fifteen, the maximum term of imprisonment is four years, not more than

one year supervised release, a $250,000 fine, and a $50 special assessment. On Count Twenty-three, the maximum term of imprisonment is [text illegible] years, not more than 3 years supervised release, a $500,000 fine, and a $50 special assessment.

III. *SENTENCING GUIDELINES CALCULATION*

The government agrees with all the offense level computations set forth in the Presentence Report including the following:

(1) The base offense level is 38 because the amount of cocaine that the defendant is reasonably foreseeably responsible for is more than 150 kilograms of cocaine;

(2) Section 3B1.1(a) provides a four-level enhancement because the defendant was the leader of criminal activity involving at least five participants;

(3) Section 3C1.1 provides a two-level enhancement for obstruction of justice. This is supported by the testimony of Fabiola Echeverry at trial and at her sentencing hearing on April 3, 1997.

(4) The Criminal History Category for the defendant is I; and

(5) The guideline range for imprisonment is life.

Appendix G

IV. *SENTENCING CONSIDERATIONS*

As the evidence at trial revealed, the defendant was the leader of a major cocaine distribution organization (the "Mike Perez Organization") that dealt illegal drugs in Philadelphia and was supplied multi-kilogram quantities of cocaine from New York City, Columbia, and Puerto Rico. Numerous individuals reported to Mike Perez, which is, in part, evidenced by the Indictment that was [text illegible]. The defendant's activities demonstrated that the defendant's drug distribution was not only a source of income for him but also a complete way of life. In particular, the testimony at trial of Fabiola Echeverry (the mother of one of the defendant's children), Pedro Prieto Gonzalez (the defendant's drug counselor), and Ramon Antonio Moya (one of the defendant's co-conspirators on whom the defendant relied extensively) revealed that the defendant did not consider the effect of his drug distribution activities, but rather exploited people in order to further his illegal activity. As to Fabiola Echeverry, the defendant threatened her while they were in prison together on these charges in order to convince her not to testify. As to Pedro Prieto Gonzalez, the defendant used him in order to store drug money at Gonzalez' house. As to Ramon Antonio Moya, the defendant put him in charge of storing drugs and money at other stash houses in Philadelphia. In using these other individuals, the defendant attempted to distance himself from the cocaine and drug money. In addition, of course, the defendant exploited numerous other individuals who worked for him, who used illegal drugs, and society as a whole (in the effect such criminal activity presents).

Appendix G

The extensive illegal activities of this defendant support the Sentencing Guideline range in which he falls. In light of this, the government submits that the only appropriate sentence is one of life imprisonment. Only then can society be assured that the defendant will not be able to threaten the streets with future criminal activity.

Respectfully submitted,

MICHAEL R. STILES
United States Attorney

s/ Thomas J. Eicher
THOMAS J. EICHER
Section Chief
Assistant United States Attorney

s/ Roberta Benjamin
ROBERTA BENJAMIN
Assistant United States Attorney

APPENDIX H — EXCERPTS FROM PEREZ SENTENCING TRANSCRIPT DATED SEPTEMBER 9, 1997

[commencing at page 10]

. . . I'm saying to this Court here, what the government has shown is exactly what it showed in *Belleteri* and the Third Circuit said that they are not entitled to a four-level enhancement.

We come to the problem that I intended to address next, when we got into amounts, but these problems are so interconnected that I apologize for mixing them up.

THE COURT: No, that's all right. But you'll allow the Court for the edification of the Third Circuit review — if you'll allow me to rule on each one as we move along I think it will aid in avoiding some confusion.

MR. FITZPATRICK: Surely, sir, yes.

THE COURT: In this situation my recollection of the trial testimony comports with that of the Assistant United States Attorney and I will therefore overrule your objection and adopt, with specificity, paragraph 32 of the Pre-Sentence Investigation report in that in my view and recollection the amount of drugs to which Mr. Perez is being held responsible for is in the amount 300 kilograms and that it is, in fact, based on the taped conversation and on information testified to at the time of trial by witnesses as to their relationship to him and his leadership role in the organization. Therefore, as I've indicated, your motion is denied.

Appendix H

What is the next issue, sir?

MR. FITZPATRICK: Well, the next issue, sir, was the amount of drugs, independent of —

* * * *

APPENDIX I — EXCERPTS FROM VOLUME 4 OF PEREZ TRIAL TRANSCRIPT

[commencing at page 4-45]

Echeverry – Cross

. . . where you were taken from prison and brought to the Government's office beginning on April 1st of 1996. Does that refresh your recollection?

A. Yes. And also Mike was brought over as well with me.

Q. Pardon me?

A. Yes. I was brought down. Mike was brought down also.

Q. Mike was brought down with you?

A. Yes, he was brought down. When we were arrested I met up with him down there.

Q. I'm not talking about when you were arrested. I'm talking about after you were in jail, after your lawyer came to see you and said if you testify against Mike, the Government will ask for a more lenient sentence. After that happened, you were brought down about 32 times to talk to the Government about these tapes and about your deal?

A. Yes. I told you I was brought down —

Q. 32 times?

A. — a number of times. Well, you've counted them, I haven't.

Q. And they asked you to listen to tapes?

A. Yes, they asked me to listen to tapes.

Q. Now, did you explain to the Government that you had been dealing cocaine before you met Mike Perez?

A. I explained that to them. That was the truth.

Q. You told them that you had been dealing cocaine before you . . .

* * *

[4-63] Echeverry – Redirect

Q. Do you know every individual in the United States?

A. I don't think anybody can know who the other person is in each country.

Q. So you lived in Colombia for some of your life, is that right?

A. I lived, yes, in Colombia for part of my life.

Q. Do you know all Colombians?

A. No, I don't know all Colombians.

Q. Do you recall there were times when we said we'll see you later this week, we'll see you next week and then we wouldn't see when we were trying to discuss what had happened on these tapes?

A. It's impossible for me to say how many times or when.

Q. Were there times when you thought you were going to be brought in and you weren't?

A. Yes, this is true. On many occasions I came and you didn't see me. Many occasions.

MS. BENJAMIN: Can I have just one minute, your Honor?

THE COURT: Certainly.

(Pause in proceedings.)

BY MS. BENJAMIN:

Q. Do you know an individual named Susanna Rosa?

A. Yes, I know her.

Q. Do you remember having conversations with her where she [4-64] called you and asked to purchase a kilogram of cocaine for a friend of hers?

A. Yes, I remember.

Q. And you agreed that you would try to do that?

A. Yes.

Q. And whose cocaine was that that you were going to provide her with?

A. I told her that I was going to ask Mike whether he could give me a kilo.

Q. So even though you negotiated that with Susanna over the telephone, when you were cross-examined and the word independently was used, that you independently dealt cocaine, did you consider that negotiation independent of Mike?

A. Well, the way which it, you know, it turned out, yes.

Q. But whose cocaine was it?

A. The cocaine was the cocaine that was brought down for Mike.

Q. And did the Government promise you any specific sentence that you would get as a result of your cooperating?

A. No, I wasn't promised any particular sentence.

(Pause in proceedings.)

MS. BENJAMIN: I have nothing further, your Honor.

THE COURT: Any recross?

Appendix 1

RECROSS-EXAMINATION

BY MR. FITZPATRICK:

* * *

Q. You start discussing money. There are — excuse me — start discussing numbers. There are a thousand, the total it's 1,900. Then you say, 60, it's written here, 1,000, look, 1,614 plus what, plus 3-80 and it continues. What were you talking about there?

A. We were talking about some money that she was asking for.

Q. When you say she, who do you mean?

A. Yolanda.

Q. And was this money she felt that she was owed?

A. Yeah, it was money that was still outstanding from the previous time, the previous trip.

Q. And that previous trip was concerning what?

A. It was money for the cocaine that she was missing.

Q. On Page 2 of the transcript, you say, do you want to go by and show it to you and Mike Perez says, no, no, go to Charlie's house, pick that up and give it from there. What did you understand Mike to mean by that?

Appendix I

A. To go by Charlie's house, pick up the money over at his house and to give it to Yolanda.

Q. Further down on Page 2, you say I don't understand these numbers, 1,614 with 60 it says here but like it can't be. Is it 60 cents? What were you referring to?

A. Well, to the account that was recorded in the paper which wasn't clear.

Q. Which paper was this?

* * *

A. It was a piece of paper that she had brought.

Q. By she, you mean Yolanda?

A. She's Yolanda.

Q. When you say is it 60 cents and Mike says 60 cents, you say no, he says there was no change in that. What did you understand him to mean by that, there was no change in that?

A. There were never any coins in the moneys that were sent.

Q. With respect to this cocaine?

A. Yes, with respect to the money for the cocaine.

Q. And then Mike says, ask her. Did you understand him to mean Yolanda?

A. Yes. The same Yolanda.

Q. And then Mike says — you say, she says that she doesn't know either and Mike says, well have her call. What did you understand him to mean by that, have her call?

A. Well, that she — that she hadn't recorded numbers on the piece of paper. So she didn't know anything about what was stated there and she would have to call the person.

Q. Who did you understand him to tell her — have you tell her to call?

A. Well, the person that had given her the paper, the owner of the money.

Q. Then Mike Perez on Page 2 says, I know that it was 1,000 and a bit more and, and something that you owed that she said that was missing. What was he referring to there?

* * *

[4-10] Echeverry – Direct

A. The money.

Q. On Page 3 of the transcript, Mike Perez says, 380 and 1,100. You say 1,100. What were you referring to there?

A. We were referring to the same count of money.

Q. Then Yolanda said, ask him if he has the little paper from the last time. What did you understand him to mean by that?

A. That she returned, she would come down and she would bring a note with an account. So she was asking him to check the account, the previous account.

Q. And again this was for the same business?

A. Yes, the same, the same business with the cocaine.

Q. And then Mike says, well, when you get it, we'll go over Charlie's house and get them. And this was the same Charlie from before?

A. The same person.

Q. Were there times when you did go over to Charlie's house?

A. Yes.

Q. Had Mike —

A. I would.

Q. — told you to?

A. Yes.

MS. BENJAMIN: At this time, the Government will play Government Exhibit 7A, Tab 170.

(Government Exhibit 7A, Tab 170, is played at this time.)

* * * *

APPENDIX J — EXCERPTS FROM VOLUME 3 OF PEREZ TRIAL TRANSCRIPT

[commencing at page 3-30]

Echeverry – Direct

Q. And why were you organizing it?

A. Because he asked me to do so.

Q. And when you say, he, you mean whom?

A. Mike.

MS. BENJAMIN: We can now play Government Exhibit 7A/B at Tab 33.

(Government Exhibit G-7A/B, Tab 33 is played at this time in open court.)

BY MS. BENJAMIN:

Q. Could you hear that conversation?

A. Yes.

Q. And who was — can you identify who was speaking, please?

A. Yes, Mike and me.

Q. And is the index properly identified, the Fabiola and Mike index, for who was actually speaking and what they said?

A. Yes.

Q. I draw your attention to the date, March 4th, 1993. This was the day after the last conversation you just testified about, right? When Mike says:

What happened?

And you say that: Only one zero came.

What did you mean by one zero?

A. I'm referring to ten kilos of cocaine.

Q. And where did they come from?

A. They were coming from New York.

[3-31] Q. Further down on the transcript when you say: Well, since the other boy is coming, yes, do you want to or what?

And then Mike Perez says: No, use it.

What did you mean by the other boy is coming?

A. That there was another person from New York coming with more cocaine.

MS. BENJAMIN: We'd now like to play Government Exhibit 7A/B, Tab 41.

Appendix J

(Government Exhibit G-7A/B, Tab 41 is played at this time in open court.)

BY MS. BENJAMIN:

Q. Can you identify the people who were speaking in that conversation, please?

A. Yes, it's me and Mike.

Q. And does the transcript accurately reflect where it says, FE, is you and MP is Mike, that you said, hello and he said, uh huh, it's all right, et cetera through the conversation?

A. Yes.

Q. And, again, you've seen all these transcripts before, is that right?

A. Yes, I have seen them.

Q. I direct your attention to the date, March 4th, 1993, it's the same day as the last conversation, is that right?

A. Yes.

Q. When Mike Perez says: It's all right, those people came. . . .

* * * *

APPENDIX K — EXCERPTS FROM VOLUME 4 OF PEREZ TRIAL TRANSCRIPT

[commencing at page 4-32]

Echeverry – Cross

A. When I pled guilty, and this is not my trial, it's Mr. Perez's trial, and I don't believe that I'm here, you know, because I take pleasure in doing this. I do not hate him. He is the father of my daughter. This is not easy for me.

Q. Nobody said it was.-

A. But he didn't accept his guilt.

Q. But you're doing something very difficult in order to save yourself time in jail, is that correct?

A. It's not easy for me to come here. If I know that I'm guilty, I accept the responsibility and I told him time and again to do the same thing. Please.

Q. Well then, why don't we tell the complete truth. Why don't you now tell us whether you were or were not on your own dealing cocaine in the time that Mike Perez was living there?

A. I wasn't independent.

Q. You were not independent?

A. No, I wasn't. My brother was here.

Appendix K

Q. Did you ever buy drugs or cocaine from people in New York for yourself?

A. Mike told me to do so.

Q. And you never did it except what Mike told you to do?

A. Yes.

Q. When Mike was in Puerto Rico, you took his cellular phone and you called drug dealers in New York, is that right?

A. Yes, the phone rang once, the cellular phone rang once and [4-33] that was the only opportunity which I picked up that phone and I picked it up because he left it at the house.

Q. And you talked to someone in New York named Hector?

A. Well, yes, I would always do that.

Q. Hector is your cousin, isn't he?

A. No, he's not my cousin. He's not a relative of mine.

Q. Hector is no relation at all to you?

A. No, he is not my family. I didn't know him before he came here to Philadelphia.

Q. That's when you first met him when he came here to Philadelphia?

Appendix K

A. Yes, sir. You know it's true.

Q. Hector is from Colombia, isn't he?

A. He is from Colombia.

Q. And you're from Colombia?

A. Yes, I am Colombian.

Q. Now, how about Yolanda?

A. Yolanda is an acquaintance, a friend.

Q. You knew Yolanda before you knew Mike Perez, didn't you?

A. Yes, I did. Of course.

Q. And Yolanda used to deliver drugs to you individually, didn't she?

A. Yolanda used to come to my house and would deliver drugs, yes.

Q. She was from your same home town in Colombia, is that . . .

* * * *

APPENDIX L — EXCERPTS FROM PEREZ SENTENCING TRANSCRIPT DATED NOVEMBER 20, 1997

[commencing at page 11]

. . . the Court whether or not she distributed — she admits to distributing, Judge — pardon me — distributing cocaine on behalf of my client.

Mrs. Echeverry was never asked on the stand, how much drugs did you get from my client. There was an admission that she was independently dealing drugs. There was a statement given to the FBI that said, my brother, who lives in the same house, he's dealing drugs, we're all Colombians. This was the source of the $139,000.00 that was seized on the New Jersey Turnpike and the driver said it came from the Colombians and, of course, the Court knows, my client is not a Colombian.

Now, Mr. Bowers (ph), asked her at Page 8 of her plea before this Court:

> What did you do — what did you help him do — meaning she helping Mr. Cintron?
>
> I would make calls for him, sometimes I accompanied him and I also picked up some money for him.

And the Court says at Page 9:

> Now, Count 25 of the indictment charges you with conspiracy to distribute cocaine. So, did we have an

agreement with you and at least another person to distribute cocaine?

Her answer to the Court was: No. I didn't have that.

Mr. Bowers: The Judge is asking you and maybe I can address.

[12] THE COURT: Please, please.

MR. BOWERS: Judge, her role — and I think we all agree — is aiding and facilitating Mr. Perez in the distribution of substances.

So, she did not distribute and did not admit before this Court, in spite of the fact that the Government comes in today and says, she's responsible for a hundred and seventeen kilos.

Now, what does this bring us to, to get down to what we're here for today, sir? This is an argument about categories. In my humble opinion, sir, it is an argument about destroying the life of Mr. Cintron by sentencing him to life imprisonment. I'm certainly not urging the Court to turn him loose upon the community.

What I am going to do — because he's thirty-three years of age and I think in spite of what he's done before — he has no prior criminal record and he does not deserve a life sentence. The Court has already — although it's not chiseled in stone — said that he gets four more points for being a supervisor. I think the Court today could change that, if it wanted.

Appendix L

What I am trying to do and the only purpose that I stand before this Court, sir, is to try to get my client less than life imprisonment. And why do I do that? The time that he serves may very well come out to be almost the same, but the . . .

* * *

[31] Now, continue, please.

THE DEFENDANT: Your Honor, Mr. Moya, he's out there. The Government knew he was running a drug corner — a crack cocaine corner — how can I be this guy's leader? How can I be a guy's crack cocaine leader? You tell me that question, your Honor. Can you give me an answer? How can I be somebody like that leader?

Everyone was independent. My job was — I didn't even have no job. Just because I know Mrs. Echeverry — I have a daughter with her, your Honor. The reason how I met her was — how I met her, your Honor — but I — the reason how she got that kid was — it got in my mind that she was ten years by herself. Me, as a man, and you as a man, your Honor, I believe that would — sit to your head and you would — free man.

So, I want halfway. She had a child. Now, I know she has everything on her hands. I'm ignorant. Her brothers — she says in the indictment and during trial that her brother was there. Her brother was not there, your Honor. There's a lot of things this Government hiding, your Honor. Her brother is not there. Has not been for — last years, waiting to talk to you, your Honor.

Appendix L

MR. FITZPATRICK: Do you want me to read this?

THE DEFENDANT: I'm not the guy the Government thinks I was and did I see — he didn't stop me with the money and now, today, they want $4 million.

* * * *

APPENDIX M — EXCERPTS FROM VOLUME 5 OF PEREZ TRIAL TRANSCRIPT

[commencing at page 5-130]

R. Moya – Cross

Q. When Perez stated he had a little job around, Moya knew that to mean he could sell cocaine for Perez.

A. That means that he had work and he could give me some cocaine.

Q. Did you sign a plea agreement with the Government?

A. Yes, sir.

Q. Do you remember when you signed it?

A. I can't recall the date.

Q. Can't recall the date?

A. I don't recall the date on which I signed it.

Q. Did you look at it before you went on the stand?

A. No.

Q. Do you remember what month it was?

A. No, I can't recall that, either.

Appendix M

Q. Do you remember what year it was?

A. Not exactly, no, I can't recall.

Q. Do you remember if it was in the '80s or the '90s?

A. Ah, yes, I understand. It was in the decade of the '90s, you know, and it was between '93 and this day.

Q. It was between '93 and this day?

A. Yes, sir.

Q. When were you arrested?

A. October 9th.

Q. What year?

A. Of '93.

[5-131] Q. Were you arrested in connection with anything you were doing with Mr. Perez or with another event?

A. No, at that time I was with Mr. Alejandro Londono.

Q. Was your arrest for selling drugs?

A. At that time Alejandro Londono was going to make a sale.

Q. To whom?

Appendix M

A. Somebody that I don't know.

Q. You were going to make a sale?

A. Alejandro Londono.

Q. I'm sorry, Alejandro and I?

A. Londono, L-o-n-d-o-n-o, it's a surname.

Q. Who was going to make the sale?

A. Alejandro Londono.

Q. And what were you charged with?

A. I was charged because I was found in the apartment precisely at the time where Alejandro had the kilo of cocaine and I was arrested there and then.

Q. What were you charged with?

A. The charges I can't — I can't remember the charges. At that time I didn't understand any English at all and . . .

Q. At the time of your arrest, you did not understand any English at all?

A. No.

Q. But you were arrested and charged?

Appendix M

A. I was taken to prison and I've been in prison until today. . . .

* * *

[5-133] Q. What is the most amount you've ever sold in a week?

A. Exactly I couldn't tell you how much I've sold in a week.

Q. You can't tell us how much you've sold in a month?

A. No.

Q. You really don't have any idea?

A. I know that — I know that — I mean I sold over 30 kilos during the time that I was selling but I can't tell you exactly, you know, how much.

Q. You sold over 30 kilos?

A. Yes, sir.

Q. Did you sell any kilos that you did not get from Mr. Perez?

A. Yes, on some occasions I sold — I sold kilos that Mike Perez didn't give me.

Q. How much — how many kilos did you sell that Mike Perez didn't give you?

Appendix M

A. How many kilos that Mike Perez didn't give me?

I don't know.

Q. No idea?

A. No, can't recall.

Q. Did the Government ever ask you how many kilos you sold when you were cooperating with them?

A. They asked me but I can't recall, I mean, whether I told them what amounts.

Q. Did you keep any records?

A. No, I didn't. I mean I only maintained, you know, I mean . . .

* * * *

APPENDIX N — FBI-302 REPORTING STATEMENT OF PEDRO PRIETO GONZALEZ DATED JUNE 15, 1994

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 6/17/94

PEDRO PRIETO GONZALEZ was interviewed in the U.S. Courthouse Room 3243, Philadelphia, Pa as part of a proffer agreement outlined in a letter provided to GONZALEZ's attorney, MICHAEL GIAMPETRO, by AUSA RONA WENIK. In addition to the interviewing agents, also present was AUSA WENIK and AUSA ROBERTA BENJAMIN. GONZALEZ advised he wanted to cooperate with the authorities in the investigation. He then provided the following information:

In the 2/26/93 conversation with MIKE PEREZ, PRIETO admitted that he was talking about purchasing 1 kilo of cocaine. He stated that he did not receive the kilo of cocaine they discussed.

He advised that he never bought or sold a kilo of cocaine for MIKE PEREZ but was with PEREZ when he was selling it. He advised that he never touched any of the cocaine during these deals.

PRIETO advised that he allowed MIKE PEREZ to use the basement of his house, 4810 B Street, to store money but not cocaine. He advised that he received no money for PEREZ using the basement.

PRIETO advised that he knows a Colombian woman named YOLANDA (LNU). He advised that she was a courier

from New York but did not come to his residence when she came but would go to FABIOLA ECHEVERRY's home.

He advised that he knew PEREZ had a number of customers but did not know the extent to which each was involved. He identified the following as a result of looking through a book of photos:

1. FABIOLA ECHEVERRY — lived with PEREZ.

2. FRANCISCO HERNANDEZ

3. NELSON DAVID GUZMAN — Big dealer for PEREZ

4. ISSAC BONILLA — customer

5. RICARDO HAINES — customer

6. CARLOS CINTRON — brother and customer

7. RUBEN RIVERA — aka ROBERT — heroin addict, was a client of GONZALEZ's at ACT.

8. NICOLAS DELGADO — aka Cheo — operated a store on 5th Street and was the Cheo on the drug records mentioned by SA O'NEILL at the detention hearing for MIKE PEREZ.

9. SUSANNA ROSA — aka SUZY — cousin of MIKE PEREZ

Appendix N

Investigation on 6/15/94 at Philadelphia, Pa.

File # 245B-PH-70161 Sub M

SA LYNN MONAHAN
by SA FRANK W. O'NEILL Date dictated 6/17/94

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

APPENDIX O — EXCERPTS FROM PEREZ SENTENCING TRANSCRIPT DATED SEPTEMBER 9, 1997

[commencing at page 8]

In addition, Mr. Haines helped Mr. Perez with cocaine in terms of the Lee Street address. He helped him unload, that was his testimony, unload 40 kilos of cocaine from a car. Mr. Perez helped him and he did it at the direction of Mr. Perez.

And Ramon Antonio Moya very specifically ran two stash-houses on behalf of Mr. Perez. One was a pizzeria, and he specifically was told by Mr. Perez where the hidden compartments were; he stored mainly cocaine, occasionally money, but he acted — very clearly from his testimony and from the transcripts — at the direction of Mr. Perez. It was always Mr. Perez, almost every tape-recorded conversation we introduced at trial had Mr. Perez as the central figure — when is he getting the cocaine in? — and there was testimony to that effect. He was the one who received the money from the New York suppliers.

And, finally, Pedro Prieto Gonzalez, he testified that his house was used to store cash for Mr. Perez, and again, it was clearly at the direction of Mr. Perez. And also that Mr. Perez counted the money at Mr. Gonzalez' house.

So I think the evidence was so overwhelming it's almost beyond a reasonable doubt, much less, a preponderance of the evidence, and therefore I think we've clearly established the leadership role on behalf of this defendant.

Appendix O

THE COURT: Rebuttal, Mr. Fitzpatrick?

MR. FITZPATRICK: My position, sir, is described . . .

* * * *

APPENDIX P — EXCERPTS FROM VOLUME 6 OF PEREZ TRIAL TRANSCRIPT

[commencing at page 6-6]

A. Just Cutin.

Q. And do you see that individual in the courtroom here today?

A. Yes, I do.

Q. Can you please identify him?

A. The gentleman over there (indicating), towards the left with the white shirt with the glasses on.

THE COURT: Identifying the defendant for the record.

BY MS. BENJAMIN:

Q. How did you know Edwin Rodriguez?

A. From a friend — from a friend buying cocaine from him.

Q. And did you actually receive cocaine from him?

A. Yes, I did.

Q. And speaking of February, '93 through March of '93, during that period, did you receive cocaine from him?

A. Yes.

Appendix P

Q. And do you know where he got his cocaine from?

A. From my knowledge from what he told me, from Mike Perez.

Q. Without telling us anything about receiving cocaine — anything before February of '93, did you know Edwin Rodriguez before February of '93?

A. No, I did not.

Q. Did you know him before February of '93 or — I'm talking about — without talking about anything with respect to cocaine — did you know him, had you met him before February of '93 — Edwin?

* * *

[6-41] A. I was dealing with Edwin before I started dealing with Mike and I was also dealing with a cousin of mines.

Q. And do you know who that was — do you remember who that was — the other person?

A. My cousin, yes. Robert Payne (phonetic).

Q. On Page 2 of the transcript, you say:

> So, it gonna be — be the one as the — as the last one, right? Remember the last one I just got from you Saturday.
>
> What were you talking about there?

Appendix P

A. The kilogram of cocaine I purchased from Mike Perez.

Q. And you say: With — you know — one was hard.

What did you mean by hard?

A. Hard, it wasn't like the one that was soft that fell. It was hard, solid.

Q. And is that good or bad?

A. That's — to me — is good.

Q. Then you say: I don't know if we can do anything back at Edwin's house, because his father just called here for me.

Right, et cetera.

What were you talking about there?

A. Edwin's dad said that — had asked Macho — Cutin's cousin, was I holding anything, drug or money in the house and I told him, no.

Q. So, you didn't tell him the truth, you told Edwin's father a . . .

* * * *

APPENDIX Q — EXCERPTS FROM PEREZ SENTENCING TRANSCRIPT DATED SEPTEMBER 9, 1997

[commencing at page 5]

. . . own.

I have also submitted with that an affidavit from one of the witnesses, Mr. Hernandez, that indeed that's exactly what happened and that there was never any control that my client had over anything. And if the government is not prepared to show that by a preponderance of evidence today, sir, I would respectfully and quite strongly urge this Court that they are not entitled to the four-level enhancement for being a supervisor of any sort of organization.

I would beg to point out to the Court that the fact that there an organization, and the initials of the organization, is really something that the government conceived when they drew this indictment. There was no one who testified on the witness stand that they belonged to an organization. There was no one who testified on the stand that their activities were in any way governed by or even known by my client. There is no one that said that they did things on behalf of the organization. They did things on behalf of themselves once they bought the drugs.

And with that in mind, sir, I would respectfully urge upon the Court that they not allow the enhancement for being a supervisor.

The only other issue that we have —

Appendix Q

THE COURT: Well, before you get to the next issue, let me address this and have the government respond.

* * * *

APPENDIX R — 1997 AFFIDAVIT OF FRANCISCO HERNANDEZ [sic] IN *UNITED STATES OF AMERICA v. FRANCISCO HERNANEZ*

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

Affidare

vs

FRANCISO, HERNANEZ,

Affiant

AFFIDAVIT

§§ In The State Of New Jersey
In The County Of Burlington

I, the affiant, Francisco Hernanez do hereby depose and affirm the following statements are true and correct:

1. I am currently under conviction for Conspiracy To Possess With Intent To Distribute Cocaine.

2. I am charged with conspiring with Mike Perez Criminal Action No#94-CR-192.

3. The extent of my conspiracy with Mike Perez was based upon my relationship with him as a buyer of cocaine. However, Mike Perez was not my only source of supple of cocaine.

Appendix R

4. Although, I associated with Mike Perez there was no managerial relationship existing between us, e.g. supervisor – worker, however there were occasions when I assisted him out-of friendship. Albeit, I was under no obligation to assist Mike Perez during the conspiracy.

WHEREFORE, I do hereby swear under the penalty of perjury, that the above statements are true and correct, pursuant to 28 U.S.C. § 1746.

Dated:

Sworn By: s/ [illegible]
Francisco Hermez
47831-066

Witnessed By: s/ Fahim Muhammed
Fahim Muhammed
00238-158

APPENDIX S — EXCERPTS FROM MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING MOTIONS FOR JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL DATED AUGUST 26, 1996

[commencing at page 15]

. . . agreed that these exact factors, taken together, constituted sufficient cautioning to cure the error by the prosecutor. *See Zehrbach*, 47 F.3d at 1267.

Additionally, the extensive evidence outlined above against both defendant Perez and defendant Rodriguez supports the conclusion that the prosecutor's comment would not have prejudiced the jury's deliberations. Considering these factors as a whole, the Court finds that the comment made by the prosecutor constitute harmless error, and, therefore, the Motion for a Judgment of Acquittal or New Trial based on the ground that the prosecutor's comment prejudiced the defendants is denied.

D. *Defendant Perez's Allegation of Sentencing Entrapment*

Our Court of Appeals has not as yet addressed the theory of sentencing entrapment. *United States v. Raven*, 39 F.3d 428, 438 (3d Cir. 1994) ("We have not as yet had occasion to address the theory of sentencing entrapment described in *Rogers* and *Lenfesty*, and we do not do so today . . . ."). The Seventh and Eleventh Circuits have rejected the doctrine. *United States v. Garcia*, 79 F.3d 74, 76 (7th Cir. 1996) ("We now hold there is no defense of sentencing manipulation in

this Circuit."), *petition for cert. filed*, No. 95-9454 (U.S. June 20, 1996); *United States v. Williams*, 954 F.2d 668, 673 (11th Cir. 1992) ("we reject . . . [the] sentence entrapment theory.").

Although the Eighth Circuit did not expressly adopt the theory of sentencing entrapment, it describes the doctrine as [16] follows:

> "outrageous official conduct [which] overcomes the will of an individual predisposed only to dealing in small quantities" for the purpose of increasing the amount of drugs . . . and the resulting sentence of the entrapped defendant.

United States v. Rogers, 982 F.2d 1241, 1245 (8th Cir. 1993) (quoting *United States v. Lenfesty*, 923 F.2d 1293, 1300 (8th Cir. 1991)). And recently, in *United States v. Kaczmarski*, Criminal Action No. 95-616-01 (Aug. 15, 1996), Judge Dalzell adopted the reasoning of First Circuit Judge, Michael Boudin who established a test for proving sentence entrapment. *Id.* In *United States v. Egemonye*, 62 F.3d 425 (1st Cir. 1995), Judge Boudin held " 'where government agents have *improperly* enlarged the scope or scale of the crime,' the sentencing court has power to exclude 'the tainted transaction' from the guideline computations and for purposes of any mandatory minimum statute." *Id.* at 427 (quoting *United States v. Montoya*, 62 F.3d 1, 3 (1st Cir. 1995) (emphasis in *Montoya*)). *Montoya* (also authored by Judge Boudin), held that a defendant must demonstrate that the Government engaged in "extraordinary misconduct" in order to be entitled to a reduction in sentence. *Id.* at 4.

Appendix S

Using the Eighth or First Circuit definition, this Court finds that the Government did not engage in sentencing entrapment. First, the Government officials did not engage in outrageous conduct or extraordinary misconduct, by merely delaying its arrest of defendant Perez after it purchase one kilogram of cocaine from him on May 15, 1993. The Government did not try to encourage [17] defendant Perez to sell larger quantities of drugs at any time thereafter; it merely waited to gather more information on him and other potential defendants. This is not improper. The fact that he was more deeply implicated in a drug conspiracy is not enough.

Next, testimony by at least three witnesses revealed that defendant Perez received cocaine in quantities ranging from 20-40 kilograms. Therefore, he was already predisposed to dealing much larger quantities of cocaine. Therefore, any relief based on this theory is denied.

An appropriate Order follows.

* * *

Appendix S

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION

NO. 94-0192-01
NO. 94-0192-10

UNITED STATES OF AMERICA

v.

MIKE PEREZ, a/k/a MIGUEL PEREZ-CINTRON
a/k/a MIGUEL PEREZ

and

EDWIN RODRIGUEZ, a/k/a "CUTIN"

ORDER

AND NOW, this 26th day of August, 1996, upon consideration of Defendants' Motions for Judgment of Acquittal and in the alternative, Defendant Perez's Motion for a New Trial, IT IS HEREBY ORDERED that Defendants' Motions are **DENIED.**

BY THE COURT:

s/ Herbert J. Hutton
HERBERT J. HUTTON, J.

APPENDIX T — CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V — GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * *

APPENDIX U — RELEVANT SENTENCING GUIDELINE

U.S.S.G. § 3B1.1

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

COMMENTARY

Application Notes:

1. *A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the*

*commission of the offense (**e.g.**, an undercover law enforcement officer) is not a participant.*

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal

activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: *This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (**i.e.,** the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.*

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions

of responsibility. This is reflected in the inclusiveness of § 3B1.1(c).

(Effective November 1, 1987, and amended effective November 1, 1991 November 1, 1993.)

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